

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NO. R. 637

24 JULY 2015

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998
(ACT NO. 107 OF 1998)REGULATIONS RELATING TO THE PROCEDURE TO BE FOLLOWED AND CRITERIA TO BE
CONSIDERED WHEN DETERMINING AN APPROPRIATE FINE IN TERMS OF SECTION 24G

I, Bomo Edith Edna Molewa, Minister of Environmental Affairs, hereby give notice of my intention under section 44(1)(aC) and 44(1)(b) of the National Environmental Management Act, 1998 (Act No.107 of 1998) (NEMA) to make regulations pertaining to the procedure to be followed and criteria to be considered when determining a fine pursuant to an application submitted in terms of section 24G of the NEMA, set out in the Schedule hereto.

Members of the public are invited to submit, within 30 days after the publication of the notice in the Gazette, written comments or inputs to the following addresses:

By post: The Director-General
Department of Environmental Affairs
Attention: Ms Nicole Limberis
Private Bag X447
PRETORIA
0001

By hand: Environment House, 473 Steve Biko Road, Pretoria, 0001
By email: nlimberis@environment.gov.za
Enquiries: Ms N Limberis
Telephone: 012 399 9502

Comments received after the closing date may not be considered.



BOMO EDITH EDNA MOLEWA
MINISTER OF ENVIRONMENTAL AFFAIRS

SCHEDULE

Definitions

1. In these Regulations any word or expression to which a meaning has been assigned in the Act has that meaning, unless a word is defined otherwise in these Regulations.

"applicant" means a person who has submitted an application pursuant to the provisions of section 24G of the Act;

"authorisations authority" means the division in the national or provincial department responsible for environmental affairs that is tasked with evaluating the environmental impact of listed or specified activities and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity;

"biodiversity impact" means the impact or potential impact that an activity has or may have on living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexities of which they are part, taking into account the conservation value of the biodiversity affected and whether or not the harm or potential harm is irreversible;

"culpable applicant" means an applicant whose prior conduct and/or engagement with environmental authorities displays a knowledge of legal requirements related to the activity; and who nonetheless commences and/or operates without the necessary authorisation; and who satisfies one or more of the criterion listed in Regulation 4(1)(b);

"director" means a member of the board, executive committee, or other managing body of a corporate body or parastatal; and, in the case of a close corporation, a member of that close corporation, in the case of a partnership, a member of that partnership, or in the case of a trust, a trustee of that trust;

"fine calculator" means the fine calculator approved by the Minister which incorporates the factors listed in Regulation 4 and includes a formula for the determination of an appropriate fine;

"firm" means anybody incorporated by or established in terms of any law as well as any partnership, trust or parastatal;

"heritage impact" means the impact or potential impact that an activity has or may have on an object or place of cultural significance or archaeological significance, including a place declared to be a national or provincial heritage site by the relevant authority, paleontological remains or a paleontological site, living heritage or public monuments and memorials;

"National Environmental Management Waste Act" means the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008);

"pollution" means any adverse impact or potential adverse impact that substances, radioactive or other waves or noise, odours, dust or heat, emitted from any activity have or may have on human health or wellbeing or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future;

"registered interested and affected party" means an interested and affected party whose name is recorded in the register opened for that application in terms of Regulation 8;

“sense of place impact” means the that impact or potential impact that an activity has or may have on the mix of natural and cultural features in the landscape that provides a strong and unique identity and character that is deeply felt by local inhabitants and visitors;

“socio-economic impact” means that impact or potential impact that an activity has or may have on the surrounding community’s social and economic well-being, including changes in demographics, housing, employment, income opportunities and demand for public services;

“social benefit” means significant benefit or potential benefit that impact on society generally;

“the Act” means the National Environmental Management Act, 1998 (Act No. 107 of 1998).

Purpose of Regulations

2. The purpose of these Regulations is to provide for the procedure to be followed and criteria to be considered in the determination of a fine pursuant to an application submitted in terms of section 24G of the Act.

Fine recommendation committee

3. (1) Each competent authority must establish a fine recommendation committee to consider all applications made in terms of section 24G with a view to making a recommendation to the competent authority on the quantum of the fine to be imposed on the applicant.
- (2) The fine recommendation committee must—
 - (a) be approved by the Director-General, the Director-General of the Department of Mineral Resources or the provincial head of department; and
 - (b) consist of at least 3 members, comprised of designated environmental management inspectors, or environmental mineral resource inspectors, where appropriate, and officials from the authorisations authority to which the application relates.
- (3) The members of the fine recommendation committee may call upon any other person with relevant technical or specialist knowledge to advise the committee as and when deemed necessary by the fine recommendation committee.
- (4) The fine recommendation committee must, at least, consider the following information before determining the proposed quantum of the fine—
 - (a) the information submitted by an applicant in terms of section 24G(1)(vii)-(viii);
 - (b) the completed application form;
 - (c) any representations made by the applicant pursuant to the section 24G application;
 - (d) the appraisal submitted by the applicant’s environmental assessment practitioner, if any; and

- (e) any technical or specialist advice received pursuant to subregulation (3) above.
- (5) If the fine recommendation committee requires any further information, in addition to that received in accordance with sub regulation (4) above, in order properly to determine the proposed quantum of the fine, it may request the competent authority to direct the applicant, within a specified time period, to provide such further information and/or undertake such further studies as the fine recommendation committee deems necessary.

Process of determining the fine and factors to be taken into account

- 4. (1) The fine recommendation committee, when determining the proposed quantum of the fine, as well as the competent authority when determining the fine in terms of section 24G(4), must take the following considerations into account—
 - (a) the impacts or potential impacts of the activity or activities namely—
 - (i) the negative, or potential negative, socio-economic impact;
 - (ii) the biodiversity impact;
 - (iii) the impact on sense of place and/or heritage;
 - (iv) any pollution and/or environmental degradation which has been, is being or may be caused by the activity or activities; and
 - (v) the social benefit, or potential social benefit, of the project; and
 - (b) the compliance history of the applicant, namely—
 - (i) whether or not final administrative enforcement notices have previously been issued to the applicant in respect of a contravention of section 24F(1) of the Act and/or section 20(1)(b) of the National Environmental Management Waste Act;
 - (ii) whether or not the applicant has previously been convicted in respect of a contravention of section 24F(1) of the Act and/or section 20(1)(b) of the National Environmental Management Waste Act;
 - (iii) whether or not the applicant has previously submitted a section 24G application in respect of an activity or activities which commenced prior to the activity or activities that are the subject of the current application
 - (c) circumstances of the applicant—
 - (i) whether the applicant is a firm or a natural person;
- (2) For the purposes of subregulation (1)(b) and in part 2 of Annexure A the competent authority must take into account whether or not—

- (a) any of the directors of the applicant firm are, or were, at the relevant time, directors of a firm to whom subregulation (1)(b) applies;
 - (b) an applicant who is a natural person is, or was, at the relevant time a director of a firm to whom subregulation (1)(b) applies.
- (3) When calculating the proposed quantum of the fine, or the fine, as the case may be, the fine recommendation committee and the competent authority must use the fine calculator approved by the Minister.

Representations

5. (1) The competent authority shall include in the application form to be used in respect of section 24G applications, the information as set out in Annexure A, which provides the applicant with an opportunity to make representations in respect of the quantum of the fine.
- (2) The application form, including Annexure A, must be attached as an appendix to any report or information submitted by the applicant to the Minister, Minister responsible for mineral resources or MEC as the case may be in terms of section 24G(1) of the Act.
- (3) The recommendation of the quantum of the fine and reasons for that recommendation together with any representations received from the applicant as well as any other relevant information, must be delivered by the fine recommendation committee to the competent authority for a decision.

The decision

6. (1) The competent authority must determine the quantum of the fine upon receipt of the recommendation of the fine recommendation committee.
- (2) The determination mentioned in subregulation (1), together with the reasons therefore, must be communicated by the competent authority to the applicant within a reasonable time.

Mandatory reporting and record keeping

7. (1) A competent authority must keep—
- (a) all applications received by the competent authority in terms of section 24G, including a register thereof;
 - (b) a register of whether fines imposed have been paid in full, partially or not at all;
 - (c) the minutes of meetings of the fine recommendation committee and recommendations made;

- (d) all decisions, including the reasons therefore and the amount of any fines imposed; and a register thereof; and
- (e) all appeal decisions and reasons therefore.

Register of interested and affected parties

- 8. (1) The applicant must open and maintain of a register of interested and affected parties.
- (2) The register must be included in the report or information submitted in terms of section 24G(1) of the Act, which register must contain the names, contact details and addresses of—
 - (a) all persons who, as a consequence of the public participation process conducted in respect of the application, have submitted written comments or attended meetings with the applicant or any environmental assessment practitioner or other specialist appointed by the applicant to assist with the application;
 - (b) all persons who have requested the applicant, in writing, to place their names on the register; and
 - (c) all organs of state that have jurisdiction in respect of the activity to which the application relates.

Culpable Applicants

- 9. (1) Where an application is submitted by a culpable applicant; the fine recommendation committee must recommend to the competent authority that the applicant pay the maximum fine amount as specified in section 24G(4) of the Act.
- (2) For the purposes of this regulation, the competent authority may consider the applicant's conduct since 7 January 2005.

Offences and Penalties

- 10. (1) A person is guilty of an offence if that person—
 - (a) fails to comply with any provision of these Regulations; or
 - (b) provides incorrect or misleading information in any form, including any document submitted in terms of these Regulations to a competent authority or omits information that may have an influence on the outcome of a decision of a competent authority.
- (2) A person convicted of an offence in terms of these Regulations is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years, and in the case of a second

or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment.

Consolidated applications

11. Where a consolidated application is submitted for more than one listed or specified activity or waste management activity or both, the competent authority may impose a single fine in respect of the consolidated application provided the activities are interrelated.

Commencement and short title

12. These Regulations are called the section 24G Fine Regulations and will take effect on the date of publication in the Government Gazette.

Transitional provisions

13. Applications submitted pursuant to the provisions of section 24G prior to the date upon which these Regulations take effect, must be dispensed of as if these Regulations has not been enacted.

ANNEXURE A TO THE SECTION 24G APPLICATION FORM

SECTION A: DIRECTIVE

Section 24G(1) of the NEMA provides that on application by a person who has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F(1); or a person who has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20(b) of the National Environmental Management: Waste Act, 2008 (Act No. 59 of 2008) the Minister, Minister responsible for mineral resources or MEC concerned (or the competent authority to which this power has been delegated), as the case may be, may direct the applicant to-

i		immediately cease the activity pending a decision on the application submitted in terms of this subsection
ii		investigate, evaluate and assess the impact of the activity on the environment
iii		remedy any adverse effects of the activity on the environment
iv		cease, modify or control any act, activity, process or omission causing pollution or environmental degradation
v		contain or prevent the movement of pollution or degradation of the environment
vi		eliminate any source of pollution or degradation
vii		compile a report containing-
	aa	a description of the need and desirability of the activity
	bb	an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be affected by the proposed activity
	cc	a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity
	dd	a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed
	ee	an environmental management programme
viii		provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.

You are hereby provided with an opportunity to make representations on any of the abovementioned instructions, including where you are of the opinion that any of these instructions are not relevant for the purposes of your application, setting out the reasons for your assertion. Kindly note further that, after taking your representations into account, a final directive will be issued.

SECTION B: DEFERRAL

Section 24G (7) of the NEMA provides that if at any stage after the submission of an application it comes to the attention of the Minister or MEC, that the applicant is under criminal investigation for the contravention of or failure to comply with section 24F (1) of the NEMA or section 20(b) of the NEMWA, the Minister, Minister responsible for mineral resources or MEC may defer a decision to issue an environmental authorisation until such time that the investigation is concluded and-

- (a) the National Prosecuting Authority has decided not to institute prosecution in respect of such contravention or failure;
- (b) the applicant concerned is acquitted or found not guilty after prosecution in respect of such contravention or failure has been instituted; or
- (c) the applicant concerned has been convicted by a court of law of an offence in respect of such contravention or failure and the applicant has in respect of the conviction exhausted all the recognised legal proceedings pertaining to appeal or review.

Kindly answer the following questions:

Are you, the applicant, being investigated for the contravention of section 24F(1) of the NEMA in respect of a matter that is <u>not subject to this application</u> and in any province in the Republic?	YES	NO	
If yes provide details of the offence being investigated and authority conducting the investigation.			
Are you, the applicant, being investigated for the contravention of section 20(b) of the NEMWA in respect of a matter that is <u>not subject to this application</u> and in any province in the Republic?	YES	NO	
If yes provide details of the offence being investigated and authority conducting the investigation.			
Are you, the applicant, being investigated for an offence in terms of section 24F(1) of the NEMA or section 20(b) of the NEMWA <u>in terms of which this application directly relates?</u>	YES	NO	UNSURE

If you have answered yes to any of the above questions, you are hereby provided with an opportunity to make representations as to why the Minister or MEC should not defer the application as he or she is entitled to do under section 24G(7).

SECTION C: QUANTUM OF THE SECTION 24G FINE

Section 24G(4) of the NEMA makes it mandatory for an applicant to pay an administrative fine as determined by the competent authority before the Minister or MEC concerned may take a decision on whether or not to grant *ex post facto* environmental authorisation or a waste management licence as the case may be. The quantum of this fine may not exceed R5 million.

Having regard to the factors listed below, you are hereby afforded with an opportunity to make representations in respect of the quantum of the fine and as to why the competent authority should not issue a maximum fine of R5 million.

PART 1: THE IMPACTS OR POTENTIAL IMPACTS OF THE ACTIVITY/ACTIVITIES

Index	Socio Economic Impact	Place an "x" in the appropriate box
Description of variable		
The activity will not give rise to any negative socio-economic impacts		
The activity could give rise to negative socio-economic impacts, but highly localised		
The activity could give rise to significant negative socio-economic and regionalized impacts		
The activity could result in wide-scale socio-economic impacts.		
Motivation:		

Index	Biodiversity Impact	Place an "x" in the appropriate box
Description of variable		
The activity will not give rise to any impacts on biodiversity		
The activity could give rise to localised biodiversity impacts		
The activity could give rise to significant biodiversity impacts		
The activity is likely to permanently / irreversibly transform/ destroy a recognised biodiversity 'hot-spot' or threaten the existence of a species or sub-species.		
Motivation:		

Index Sense of Place Impact and / or Heritage Impact	Place an "x" in the appropriate box
Description of variable	
The activity is in keeping with the surrounding environment and / or does not negatively impact on the affected area's sense of place and /or heritage	
The activity is not in keeping with the surrounding environment and will have a localised impact on the affected area's sense of place and/or heritage	
The activity is not in keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage	
The activity is completely out of keeping with the surrounding environment and will have a significant impact on the affected area's sense of place and/ or heritage	
Motivation:	

Index Pollution Impact	Place an "x" in the appropriate box
Description of variable	
The activity will not give rise to any pollution	
The activity could give rise to pollution with low impacts.	
The activity could give rise to pollution with moderate impacts.	
The activity could give rise to pollution with high impacts.	
The activity could give rise to pollution with major impacts.	
Motivation:	

Index Social Benefit	Place an "x" in the appropriate box
Description of variable	
The activity provides no social service / infrastructure to the affected community	
The activity provides indirect social service / infrastructure to the affected community	
The activity provides some social service / infrastructure to the affected community	
The activity provides an important social service / infrastructure to the affected community	
The activity provides an essential social service / infrastructure to the affected community	
Motivation:	

PART 2: COMPLIANCE HISTORY AND KNOWLEDGE OF THE APPLICANT

Index	Previous administrative action (i.e. final administrative notices) issued to the applicant in respect of a contravention of section 24F(1) of the National Environmental Management Act and/or section 20(1)(b) of the National Environmental Management Waste Act	Place an "x" in the appropriate box
Description of variable		
Administrative action was previously taken against the applicant in respect of the abovementioned provisions.		
Explanation of all previous administrative action taken in respect of the above:		

Index	Previous Convictions in terms of section 24F(1) of the National Environmental Management Act and/or section 20(1)(b) of the National Environmental Management Waste Act	Place an "x" in the appropriate box
Description of variable		
The applicant was previously convicted in terms of the abovementioned provisions.		
Explanation of all previous convictions in respect of the above:		

Index	Number of section 24G applications previously submitted by the applicant	Place an "x" in the appropriate box
Description of variable		
Previous applications were submitted by the applicant.		
No previous applications have been submitted by the applicant but a previous application(s) have been submitted by a firm(s) on whose board one or more of the applicant's directors sit or sat at the relevant time.		
No previous applications have been submitted by the applicant but the applicant sat on the board of a firm that previously submitted an application.		
Explanation in respect of all previous applications submitted in terms of section 24G :		

APPLICANT'S PERSONAL CIRCUMSTANCES

Index	Applicant's legal persona	Place an "x" in the appropriate box
	Description of variable	
	The applicant is a natural person.	
	The applicant is a firm.	
	Describe the firm:	

An explanation as to why the applicant did not obtain an environmental authorisation and/or waste management licence must be attached to this application.

NOTE: Unless protected by law, all information contained in and attached to this application form may become public information on receipt by the competent authority. This application must be attached to any documentation or information submitted by an applicant further to section 24G (1).